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Eco Hijau Semula Sdn Bhd & Anor v Mohd Najeib bin Ahmad Walat (t/a sole proprietor under the name of 'Triple A Aura Resources')

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HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22C-17–06 OF 2020
WONG KIAN KHEONG J
1 JULY 2023

C

Civil Procedure — Interest — Judgment sum — Whether plaintiffs could claim interest on sums adjudged to be paid by defendant to plaintiffs — Rules of Court 2012 O 42 r 12, O 59 rr 2(2), 3(2), 8(b), 16(1)(c), (e), (f), (2), (3), 19(1) & (2)

D

Contract — Claim for work done — Claim for money owed — Whether first plaintiff's loan made to defendant — Whether defendant could rely on earlier letter of awards to resist plaintiffs' claim — Whether the new letters of award constituted contracts between parties — Whether plaintiffs accepted the new letters of award by their conduct — Whether defendant's letters of termination unlawful — Whether plaintiffs could claim for value of works done by plaintiffs under new letters of award — Whether plaintiffs could claim loss of profit — Whether plaintiffs entitled to pre-judgment and post judgment interest — Whether plaintiffs entitled to costs — Whether witnesses were credible — Civil Law Act 1956 s 11 — Contracts Act 1950 ss 2(a), (b), 7(a), (b) & 74

E

F

Evidence — Witness — Credibility of — Whether witness credible and reliable — Whether conduct of witness supported his veracity — Evidence Act 1950 s 8(2)

G

The defendant as the sole proprietor of Triple A Aura Resource ('TAAR') had approached Mr Ng Hee Sin ('SP3') and Mr Ng Hee Chye ('Hee Chye'), the directors and shareholders of the first plaintiff and the second plaintiff, to assist the defendant to secure two construction projects ('the two projects') from Majlis Bandaraya Shah Alam ('MBSA'). In this regard, the defendant had made a representation to SP3 and Hee Chye that if the defendant secured the two projects, the defendant would appoint the plaintiffs as the subcontractors for the two projects ('the defendant's representation'). These facts were supported by the plaintiffs' witness SP1 who was the landscape architect of MBSA. The two projects were subsequently awarded to the defendant by MBSA via the first main contract and the second main contract. TAAR then issued two letters of award dated 5 November 2019 ('the two LAs') to the plaintiffs regarding the two projects, but due to some errors in the letters of award, TAAR issued four

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letters of award dated 7 November 2019 ('the four LAs') to the plaintiffs concerning the two projects. SP3 testified that after the issuance of the four LAs: (a) TAAR had issued four purchase orders to the plaintiffs ('the four POs'); (b) the first plaintiff's loan amounting to RM25,000 was given to the defendant; (c) the second plaintiff had appointed Guangzhou Migo Import and Export Company ('GMIE') to perform works for the second projects and GMIE had issued two invoices to the second plaintiff; (d) the plaintiffs' works were done based on two progress reports; and (e) the plaintiffs attended five meetings with MBSA and the defendant. The problem arose when the defendant terminated the four LAs without paying the five invoices issued by the plaintiffs. To make matters worse, the defendant had met SP3 on three separate occasions ('the three meetings between the defendant and SP3') to inform him that the defendant intended to withdraw the defendant's termination of the four LAs, but a cheque dated 2 April 2020 which was issued by the defendant to the plaintiff as part payment of the invoices was dishonored. The defendant also failed to respond to the two demands ('the plaintiffs' two demands') issued by the plaintiffs alleging that the termination letters were wrongful. The plaintiffs then filed the present action claiming: (i) the return of the first plaintiff's loan; (ii) the value of the first plaintiff's works based on the two LAs dated 7 November 2019 amounting to RM890,621.87 and the value of the second plaintiff's works based on the two LAs dated 7 November 2019 amounting to RM111,000 ('the value of the plaintiffs works as claimed by the plaintiffs'); and (iii) the loss of profit amounting to RM1,067,028.51 to be paid by the defendant to the first plaintiff and the loss of profit amounting to RM103,460.84 to be paid by the defendant to the second plaintiff ('the sums of loss of profit as claimed by the plaintiffs') (collectively referred to as 'the plaintiffs' claims'). The issues to be determined in the present case were: (1) the credibility of the witnesses; (2) whether the defendant's representation had been made; (3) whether the first plaintiff's loan was given to the defendant; (4) whether the defendant could rely on the two LAs; (5) whether the four LAs constituted contracts between the defendant and the plaintiffs; (6) whether the defendant's four termination letters was lawful; (7) whether the plaintiffs could claim damages for the defendant's breaches of the four LAs; (8) whether the plaintiffs' claims for the value of the plaintiffs' works and loss of profit ('the plaintiffs' two heads of claim') were too remote in law to be claimed under s 74(1) of the Contracts Act 1950 ('the CA'); (9) whether the plaintiff could recover the quantum of the plaintiffs' two heads of claim; and (10) whether the plaintiffs could claim interest on sums adjudged to be paid by the defendant to the plaintiffs.

Held:

(1) The court accepted SP1's evidence because SP1 was an independent witness without any interest in the outcome of this suit. Further, the court found that SP3 was a credible witness because firstly, his testimony

was supported by documentary evidence, inter alia, the WhatsApp messages between SP3 and the defendant. Secondly, the following conduct of SP3 supported his veracity: (a) the pre-tender site visit; (b) the first plaintiff's loan was given to the defendant; (c) the five meetings between the plaintiffs, MBSA and the defendant; and (d) the three meetings between the defendant and SP3. It ought to be noted that the conduct of a party was relevant under s 8(2) of the Evidence Act 1950. Further, the court ruled that the defendant was not a reliable witness. The documents in particular the WhatsApp messages between SP3 and the defendant, the four LAs, the defendant's four POs, the defendant's dishonored cheque, audio recording of the three meetings between the defendant and SP3 as well of the transcript of the said three meetings had undermined, if not destroyed, the defendant's credibility (see paras 30–32).

(2) On a balance of probabilities, the court found that the defendant's representation had indeed been made to the plaintiffs. Firstly, based on the defendant's own admission, it was clear that the defendant did not have the necessary expertise, experience, track record and financial resources to bid for, let alone complete, the two projects. Secondly, the plaintiffs were not charitable institutions. If the defendant's representation had not been made, the plaintiffs would not have expended much time, effort, and money, inter alia, to do the pre-tender site visit, to perform the pre-tender works, to appoint GMIE, to issue the five invoices to the defendant, to prepare the plaintiffs' final drawings of the two projects, etc (see para 33).

(3) The court found as a fact that on a balance of probabilities, the first plaintiff's loan had been made to the defendant because of the following evidence and reasons: (a) the said loan which was advanced to the defendant by way of three trances was evidenced by three WhatsApp messages between SP3 and the defendant; and (b) SP3's oral evidence regarding the said loan was no challenged during SP3's cross-examination by the defendant's counsel, as such, such evidence was deemed to be accepted by the defendant (see para 34).

(4) The court found that the defendant could not rely on the two LAs dated 5 November 2019 for the following reasons: (a) the two LAs constituted 'proposals' (popularly known as 'offers') within the meaning of s 2(a) of the CA and the defendant's proposals in the two LAs were superseded by his new proposals in the four LAs dated 7 November 2019; (b) the plaintiffs did not 'accept' the defendant's proposals in the two LAs as understood under s 2(b) read with s 7(a) and (b) of the CA; (c) the four POs (issued by the defendant) had referred to the four LAs and not the two LAs; and (d) in paras 7 to 10 of the Post-Trial Agreed Facts, the

defendant had admitted that there were errors in the two LAs and upon the request of the plaintiffs, the defendant had issued the four LAs dated 7 November 2019 (see para 36).

(5) The court found that the four LAs dated 7 November 2019 constituted agreements between the defendant and the plaintiffs with regard to the two projects. This finding was based on the following evidence and reasons: (a) the four LAs fell within the definition of 'proposal' in s 2(a) of the CA; (b) the four LAs did not prescribe the manner for the plaintiffs to accept the four LAs, as such, the plaintiffs were entitled under s 7(b) of the CA to accept the four LAs in 'some usual and reasonable manner' such as by way of conduct; (c) in accordance with s 2(b) read with s 7(b) of the CA, the plaintiff had accepted the four LAs by their conduct; and (d) the plaintiffs' acceptance of the four LAs was 'absolute and unqualified' within the meaning of s 7(a) of the CA. Further, based on the conduct of the defendant, inter alia, the issuance of the four POs, the issuance of the cheque dated 2 April 2020 and the WhatsApp messages between the defendant and SP3, SP3 was estopped from disputing the fact that the four LAs constituted agreements between the defendant and the plaintiffs regarding the two projects (see paras 37–38).

(6) The court ruled that the defendant's four termination letters were not valid because: (a) the first and second paras in the said termination letters had wrongfully referred to the two LAs dated 5 November 2019 which did not constitute contracts between the parties; and (b) para 3 of the said termination letters, which stated that the plaintiffs had failed to prepare written agreements for the execution of all parties within the stipulated time, was unlawful for the following reasons: (i) there was nothing in the CA which required an agreement to be in writing; (ii) the four LAs did not stipulate that the four LAs were subjected to a condition, namely, the parties must execute a written contract before the four LAs could be lawfully accepted by the plaintiffs; (iii) the plaintiffs had accepted the four LAs by their conduct; and (iv) the defendant was estopped from asserting that there should be written agreements between the parties in respect of the two projects. The unlawful defendant's four termination letters meant that the defendant had breached the four LAs ('the defendant's four breaches of the four LAs') (see paras 39–40).

(7) The court found that the value of the plaintiffs' works fulfilled the first limb of s 74 of the CA because the said value 'naturally arose in the usual course of things' from the defendant's four breaches of the four LAs. If otherwise, despite the unlawful defendant's four termination letters, the defendant would be unjustly enriched by the value of the plaintiffs' works. The court further found that the plaintiffs' loss of profit fell under the second limb of s 74 of the CA, ie, the plaintiffs and defendant knew when they entered into the four LAs that the loss of profit was 'likely to

result' from the defendant's four breaches of the four LAs. This decision was based on the following reasons: (a) the four LAs were commercial contracts; (b) the plaintiffs were not charitable institutions and did not accept the four LAs for any altruistic purpose; (c) the defendant did not resign from the Malaysian Anti-Corruption Commission and register TAAR for any philanthropic reason; and (d) the parties had knowingly entered into the four LAs with a view to attain profit (see para 44).

(8) The plaintiffs had discharged the onus to prove the value of the plaintiffs' works based on the following evidence and reasons: (a) the defendant's four POs, the plaintiffs' five invoices, and the two progress reports; (b) the value of the plaintiffs' works had been stated in the plaintiffs' two demands and the defendant did not deny such value, as such, there was an implied admission of the sum of money owed; and (c) considering that the defendant did not adduce any evidence showing that the plaintiffs' works had not been performed or the plaintiffs' works were defective, the defendant therefore could not dispute the value of the plaintiffs' works. Based on the above evidence and reasons, the court adjudged that the defendant shall pay the value of the plaintiffs' works as claimed by the plaintiffs ('the judgment sums for the value of the plaintiffs' works') (see paras 45–46).

(9) With respect to the plaintiffs' loss of profits, the court found that the court may decide on the quantum of the plaintiffs' loss of profit without expert opinion. Further, considering that SP3 was an honest witness, the court accepted SP3's evidence regarding the quantum of the plaintiffs' loss of profit. It ought to be noted that the defendant had failed to tender any evidence to rebut SP3's evidence in relation to the plaintiffs' loss of profit. In any event, as stated earlier, the court had made a finding of fact that the defendant was not a credible witness. Premised on SP3's evidence, the court ordered the defendant to pay the plaintiffs the amount of loss of profit as claimed by the plaintiffs ('the judgment sums for the loss of profit') (see paras 47–48).

(10) The court had the discretionary power to award the pre-judgment interest (pursuant to s 11 of the Civil Law Act 1956) and the post-judgment interest (pursuant to O 42 r 12 of the Rules of Court 2012 ('the ROC')). Pursuant to the above provisions, the court had exercised its discretion to order the defendant to pay to the first plaintiff interest at the rate of 5%pa on an amount of RM25,000 from 5 May 2020 (after the lapse of 14 days as stated in the first plaintiffs' demand) until the defendant's full payment of the said amount. Further, the court awarded interest at the rate of 5%pa on the judgment sums for the value of the plaintiffs' works as well as the loss of profit from 5 January 2020 (being the date in which the cause of action arose) until the defendant's full payment of the said judgment sums (see paras 50–51).

(11) By reasons of O 59 rr 2(2), 3(2), 16(2), (3), 19(1) and (2) of the ROC, the court had ordered the defendant to pay costs to the plaintiffs on a standard basis. The plaintiffs had claimed a sum of RM50,000 as 'Getting Up' ('GU') but the court exercised its discretion to award an amount of RM40,000 as GU for the following reasons: (a) pursuant to O 59 r 8(b) of the ROC, the defendant's conduct in agreeing to the post-trial agreed facts and post-trial agreed issues reduced the amount of GU because such conduct had saved time, effort and costs of all learned counsel in this case, and such conduct had assisted the court to decide the case; (b) the high amount of the plaintiffs' claim was relevant according to O 59 r 16(1)(f) of the ROC; (c) this case involved many documents (see O 59 r 16(1)(c) of the ROC); and (d) this case was important to the plaintiffs (see O 59 r 16(1)(e) of the ROC) (see paras 52–53).

[Bahasa Malaysia summary

Defendan sebagai pemilik tunggal Triple A Aura Resource ('TAAR') telah bertemu dengan Encik Ng Hee Sin ('SP3') dan Encik Ng Hee Chye ('Hee Chye'), para pengarah dan pemegang saham plaintif pertama dan plaintif kedua, untuk membantu defendan mendapatkan dua projek pembinaan ('dua projek tersebut') daripada Majlis Bandaraya Shah Alam ('MBSA'). Dalam hal ini, defendan telah membuat representasi kepada SP3 dan Hee Chye bahawa jika defendan memperoleh kedua-dua projek tersebut, defendan akan melantik plaintif-plaintif sebagai subkontraktor bagi kedua-dua projek tersebut ('representasi defendan'). Fakta ini disokong oleh saksi plaintif-plaintif SP1 yang merupakan arkitek landskap MBSA. Kedua-dua projek tersebut kemudiannya diberikan kepada defendan oleh MBSA melalui kontrak utama pertama dan kontrak utama kedua. TAAR kemudiannya mengeluarkan dua surat tawaran bertarikh 5 November 2019 ('dua ST tersebut') kepada plaintif-plaintif berhubung dua projek tersebut, tetapi disebabkan beberapa kesilapan dalam surat tawaran tersebut, TAAR mengeluarkan empat surat tawaran bertarikh 7 November 2019 ('empat ST tersebut') kepada plaintif-plaintif berkenaan kedua-dua projek tersebut. SP3 memberi keterangan bahawa selepas pengeluaran empat ST tersebut: (a) TAAR telah mengeluarkan empat pesanan pembelian kepada plaintif-plaintif ('empat PO'); (b) plaintif pertama telah memberikan pinjaman berjumlah RM25,000 kepada defendan; (c) plaintif kedua telah melantik Guangzhou Migo Import and Export Company ('GMIE') untuk melaksanakan kerja-kerja bagi projek kedua dan GMIE telah mengeluarkan dua invois kepada plaintif kedua; (d) kerja-kerja plaintif-plaintif telah disiapkan berdasarkan dua laporan kemajuan; dan (e) plaintif-plaintif telah menghadiri lima mesyuarat dengan MBSA dan defendan. Masalah timbul apabila defendan menamatkan empat ST tersebut tanpa membayar lima invois yang dikeluarkan oleh plaintif-plaintif. Lebih memburukkan keadaan, defendan telah mengadakan pertemuan dengan SP3 pada tiga masa berasingan ('tiga mesyuarat antara defendan dan SP3') untuk memaklumkan kepadanya bahawa defendan

berhasrat menarik balik penamatan defendan terhadap empat ST tersebut, tetapi cek bertarikh 2 April 2020 yang telah dikeluarkan oleh defendan kepada plaintif-plaintif sebagai sebahagian daripada pembayaran invois tersebut adalah cek tak laku. Defendan juga gagal menjawab kedua-dua tuntutan ('dua tuntutan plaintif-plaintif') yang dikeluarkan oleh plaintif-plaintif yang mendakwa bahawa surat-surat penamatan tersebut adalah salah. Plaintif-plaintif kemudiannya memfailkan tindakan semasa bagi menuntut: (i) pemulangan pinjaman plaintif pertama; (ii) nilai kerja plaintif pertama berdasarkan dua ST bertarikh 7 November 2019 berjumlah RM890,621.87 dan nilai kerja plaintif kedua berdasarkan dua ST bertarikh 7 November 2019 berjumlah RM111,000 ('nilai kerja plaintif-plaintif seperti yang dituntut oleh plaintif-plaintif'); dan (iii) kehilangan keuntungan berjumlah RM1,067,028.51 yang perlu dibayar oleh defendan kepada plaintif pertama dan kehilangan keuntungan berjumlah RM103,460.84 yang perlu dibayar oleh defendan kepada plaintif kedua ('jumlah kehilangan keuntungan seperti yang dituntut oleh plaintif-plaintif') (secara kolektif dirujuk sebagai 'tuntutan-tuntutan plaintif-plaintif'). Isu-isu yang perlu ditentukan dalam kes ini ialah: (1) kredibiliti saksi-saksi; (2) sama ada representasi defendan telah dibuat; (3) sama ada pinjaman plaintif pertama telah diberikan kepada defendan; (4) sama ada defendan boleh bergantung pada dua ST tersebut; (5) sama ada empat ST tersebut membentuk kontrak antara defendan dan plaintif-plaintif; (6) sama ada empat surat penamatan defendan adalah sah; (7) sama ada plaintif-plaintif boleh menuntut ganti rugi bagi pelanggaran defendan terhadap empat ST tersebut; (8) sama ada tuntutan plaintif-plaintif untuk nilai kerja plaintif dan kehilangan keuntungan ('dua tuntutan plaintif-plaintif') adalah terlalu jauh di sisi undang-undang untuk dituntut di bawah s 74(1) Akta Kontrak 1950 ('AK'); (9) sama ada plaintif-plaintif boleh mendapatkan semula kuantum bagi dua tuntutan plaintif-plaintif tersebut; dan (10) sama ada plaintif-plaintif boleh menuntut faedah ke atas jumlah yang diputuskan untuk dibayar oleh defendan kepada plaintif-plaintif.

Diputuskan:

(1) Mahkamah menerima keterangan SP1 kerana SP1 adalah saksi bebas tanpa apa-apa kepentingan dalam keputusan saman ini. Seterusnya, mahkamah mendapati SP3 adalah saksi yang boleh dipercayai kerana pertamanya, keterangannya disokong oleh keterangan dokumen, antaranya, mesej WhatsApp antara SP3 dan defendan. Kedua, kelakuan-kelakuan SP3 yang berikut menyokong kebolehpercayaannya: (a) lawatan tapak pra-tender; (b) pinjaman plaintif pertama telah diberikan kepada defendan; (c) lima mesyuarat antara plaintif-plaintif, MBSA dan defendan; dan (d) tiga mesyuarat antara defendan dan SP3. Perlu diingatkan bahawa kelakuan sesuatu pihak adalah relevan di bawah s 8(2) Akta Keterangan 1950. Selanjutnya, mahkamah memutuskan bahawa defendan bukan saksi yang boleh dipercayai.

Dokumen-dokumen khususnya mesej WhatsApp antara SP3 dan defendan, empat ST tersebut, empat PO defendan, cek tak laku defendan, rakaman audio bagi tiga mesyuarat antara defendan dan SP3 serta transkrip bagi tiga mesyuarat tersebut telah menjejaskan, jika tidak memusnahkan, kredibiliti defendan (lihat perenggan 30–32).

(2) Di atas imbangan kebarangkalian, mahkamah mendapati bahawa representasi defendan sememangnya telah dibuat kepada plaintif-plaintif. Pertama, berdasarkan pengakuan defendan sendiri, adalah jelas bahawa defendan tidak mempunyai kepakaran, pengalaman, rekod prestasi dan sumber kewangan yang diperlukan untuk membida, apatah lagi menyiapkan, kedua-dua projek tersebut. Kedua, plaintif-plaintif bukan institusi kebajikan. Sekiranya representasi defendan tidak dibuat, plaintif-plaintif tidak akan menghabiskan banyak masa, usaha, dan wang, antara lain, untuk melakukan lawatan tapak pra-tender, untuk melaksanakan kerja-kerja pra-tender, untuk melantik GMIE, untuk mengeluarkan lima invois tersebut kepada defendan, untuk menyediakan lukisan akhir plaintif-plaintif bagi kedua-dua projek tersebut, dsb. (lihat perenggan 33).

(3) Mahkamah mendapati sebagai fakta bahawa atas imbangan kebarangkalian, pinjaman plaintif pertama telah dibuat kepada defendan berdasarkan keterangan dan alasan-alasan berikut: (a) pinjaman tersebut yang telah diberikan kepada defendan melalui tiga peringkat telah dibuktikan melalui tiga mesej WhatsApp antara SP3 dan defendan; dan (b) keterangan lisan SP3 mengenai pinjaman tersebut tidak dicabar semasa pemeriksaan balas SP3 oleh peguam defendan, oleh itu, keterangan tersebut disifatkan telah diterima oleh defendan (lihat perenggan 34).

(4) Mahkamah mendapati defendan tidak boleh bergantung kepada dua ST yang bertarikh 5 November 2019 tersebut atas alasan-alasan berikut: (a) dua ST tersebut membentuk 'cadangan' (lebih dikenali sebagai 'tawaran') dalam pengertian s 2(a) AK dan cadangan defendan dalam dua ST tersebut telah digantikan dengan cadangan baharunya dalam empat ST bertarikh 7 November 2019 tersebut; (b) plaintif-plaintif tidak 'menerima' cadangan defendan dalam dua ST tersebut seperti yang difahami di bawah s 2(b) dibaca dengan s 7(a) dan (b) AK; (c) empat PO tersebut (yang dikeluarkan oleh defendan) telah merujuk kepada empat ST tersebut dan bukannya dua ST tersebut; dan (d) dalam perenggan 7 hingga 10 'post-trial agreed facts', defendan telah mengakui bahawa terdapat kesilapan dalam dua ST tersebut dan atas permintaan plaintif-plaintif, defendan telah mengeluarkan empat ST bertarikh 7 November 2019 tersebut (lihat perenggan 36).

(5) Mahkamah mendapati bahawa empat ST bertarikh 7 November 2019 tersebut merupakan perjanjian antara defendan dan plaintif-plaintif

berkenaan dengan kedua-dua projek tersebut. Dapatan ini adalah berdasarkan keterangan dan alasan-alasan berikut: (a) empat ST tersebut termasuk dalam takrifan 'cadangan' dalam s 2(a) AK; (b) empat ST tersebut tidak menetapkan cara untuk plaintif-plaintif menerima empat ST tersebut, oleh itu, plaintif-plaintif berhak di bawah s 7(b) AK untuk menerima empat ST tersebut dalam 'cara biasa dan munasabah' seperti melalui kelakuan; (c) mengikut s 2(b) yang dibaca dengan s 7(b) AK, plaintif-plaintif telah menerima empat ST tersebut melalui kelakuan mereka; dan (d) penerimaan plaintif-plaintif terhadap empat ST tersebut adalah 'mutlak dan tak bersyarat' dalam pengertian s 7(a) AK. Selanjutnya, berdasarkan kelakuan defendan, antara lain, pengeluaran empat PO tersebut, pengeluaran cek bertarikh 2 April 2020 dan mesej WhatsApp antara defendan dan SP3, SP3 telah dihalang daripada mempertikaikan fakta bahawa empat ST tersebut membentuk perjanjian antara defendan dan plaintif-plaintif berhubung kedua-dua projek tersebut (lihat perenggan 37–38).

(6) Mahkamah memutuskan bahawa empat surat penamatan defendan adalah tidak sah kerana: (a) perenggan pertama dan kedua dalam surat-surat penamatan tersebut telah secara salah merujuk kepada dua ST bertarikh 5 November 2019 tersebut yang tidak membentuk kontrak antara pihak-pihak; dan (b) perenggan 3 surat-surat penamatan tersebut, yang menyatakan bahawa plaintif-plaintif telah gagal menyediakan perjanjian bertulis untuk pelaksanaan semua pihak dalam masa yang ditetapkan, adalah menyalahi undang-undang atas sebab-sebab berikut: (i) tiada apa-apa dalam AK yang memerlukan perjanjian dibuat secara bertulis; (ii) empat ST tersebut tidak menetapkan bahawa empat ST tersebut tertakluk kepada syarat, iaitu, pihak-pihak mesti memeterai kontrak bertulis sebelum empat ST tersebut boleh diterima secara sah oleh plaintif-plaintif; (iii) plaintif-plaintif telah menerima empat ST tersebut melalui kelakuan mereka; dan (iv) defendan terhalang daripada menyatakan bahawa perlu ada perjanjian bertulis antara pihak-pihak berkenaan dengan kedua-dua projek tersebut. Memandangkan empat surat penamatan defendan tersebut adalah menyalahi undang-undang maka defendan telah melanggar empat ST tersebut ('empat pelanggaran empat ST tersebut oleh defendan) (lihat perenggan 39–40).

(7) Mahkamah mendapati bahawa nilai kerja plaintif-plaintif memenuhi bahagian pertama s 74 AK kerana nilai tersebut 'yang sendirinya timbul dalam keadaan biasa' daripada empat pelanggaran defendan terhadap empat ST tersebut. Jika tidak, walaupun terdapat empat surat penamatan defendan yang menyalahi undang-undang, defendan akan secara tidak adil diperkayakan dengan nilai kerja plaintif-plaintif. Mahkamah selanjutnya mendapati bahawa kehilangan keuntungan plaintif-plaintif termasuk di bawah bahagian kedua s 74 AK, iaitu, plaintif-plaintif dan defendan tahu bahawa apabila mereka memasuki empat ST tersebut

kehilangan keuntungan 'mungkin akan berakibat' daripada empat pelanggaran defendan terhadap empat ST tersebut. Keputusan ini adalah berdasarkan alasan-alasan berikut: (a) empat ST tersebut adalah kontrak komersial; (b) plaintif-plaintif bukan institusi kebajikan dan tidak menerima empat ST tersebut untuk apa-apa tujuan altruistik; (c) defendan tidak meletakkan jawatan daripada Suruhanjaya Pencegahan Rasuah Malaysia dan mendaftarkan TAAR atas apa-apa sebab kebajikan; dan (d) pihak-pihak secara sedar telah memasuki empat ST tersebut dengan tujuan untuk memperoleh keuntungan (lihat perenggan 44).

(8) Plaintif-plaintif telah melepaskan tanggungjawab untuk membuktikan nilai kerja plaintif-plaintif berdasarkan keterangan dan alasan-alasan berikut: (a) empat PO defendan, lima invois plaintif-plaintif, dan dua laporan kemajuan tersebut; (b) nilai kerja plaintif-plaintif telah dinyatakan dalam dua tuntutan plaintif dan defendan tidak menafikan nilai tersebut, oleh itu, terdapat pengakuan tersirat bagi jumlah wang yang terhutang; dan (c) memandangkan defendan tidak mengemukakan apa-apa keterangan yang menunjukkan bahawa kerja plaintif-plaintif tidak dilakukan atau kerja plaintif tidak lengkap, maka defendan tidak boleh mempertikaikan nilai kerja plaintif-plaintif. Berdasarkan keterangan dan alasan-alasan di atas, mahkamah memutuskan bahawa defendan hendaklah membayar nilai kerja plaintif-plaintif seperti yang dituntut oleh plaintif-plaintif ('jumlah penghakiman untuk nilai kerja plaintif-plaintif') (lihat perenggan 45–46).

(9) Berkenaan dengan kehilangan keuntungan plaintif-plaintif, mahkamah mendapati bahawa mahkamah boleh memutuskan kuantum kehilangan keuntungan plaintif-plaintif tanpa pendapat pakar. Selanjutnya, memandangkan SP3 adalah saksi yang jujur, mahkamah menerima keterangan SP3 berhubung kuantum kehilangan keuntungan plaintif-plaintif. Perlu diingat bahawa defendan telah gagal mengemukakan apa-apa keterangan untuk menyangkal keterangan SP3 berhubung dengan kehilangan keuntungan plaintif-plaintif. Walau apa pun, seperti yang dinyatakan sebelum ini, mahkamah telah membuat dapatan fakta bahawa defendan bukan saksi yang boleh dipercayai. Berdasarkan keterangan SP3, mahkamah memerintahkan defendan membayar kepada plaintif-plaintif jumlah kehilangan keuntungan seperti yang dituntut oleh plaintif-plaintif ('jumlah penghakiman untuk kehilangan keuntungan') (lihat perenggan 47–48).

(10) Mahkamah mempunyai kuasa budi bicara untuk mengawardkan faedah pra-penghakiman (menurut s 11 Akta Undang-Undang Sivil 1956) dan faedah selepas penghakiman (menurut A 42 k 12 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012')). Selaras dengan peruntukan-peruntukan di atas, mahkamah telah menggunakan budi

bicaranya untuk memerintahkan defendan membayar faedah kepada plaintif pertama pada kadar 5% setahun pada jumlah RM25,000 mulai 5 Mei 2020 (selepas luput 14 hari seperti yang dinyatakan dalam tuntutan plaintif pertama) sehingga pembayaran penuh oleh defendan bagi jumlah tersebut. Selanjutnya, mahkamah memberikan faedah pada kadar 5% setahun ke atas jumlah penghakiman bagi nilai kerja plaintif-plaintif serta kehilangan keuntungan dari 5 Januari 2020 (sebagai tarikh di mana kausa tindakan timbul) sehingga bayaran penuh defendan bagi jumlah penghakiman tersebut (lihat perenggan 50–51).

(11) Bersandarkan kepada A 59 kk 2(2), 3(2), 16(2), (3), 19(1) dan (2) KKM 2012, mahkamah telah memerintahkan defendan membayar kos kepada plaintif-plaintif secara standard. Plaintif-plaintif telah menuntut sejumlah RM50,000 sebagai 'Getting Up' ('GU') tetapi mahkamah menggunakan budi bicaranya untuk memberikan sejumlah RM40,000 sebagai GU atas alasan-alasan berikut: (a) menurut A 59 k 8(b) KKM 2012, kelakuan defendan dalam bersetuju dengan 'post-trial agreed facts' dan 'post-trial agreed issues' mengurangkan jumlah GU kerana kelakuan sedemikian telah menjimatkan masa, usaha dan kos semua peguam terpelajar dalam kes ini, dan kelakuan sedemikian juga telah membantu mahkamah memutuskan kes; (b) jumlah tuntutan plaintif-plaintif yang tinggi adalah relevan mengikut A 59 k 16(1)(f) KKM 2012; (c) kes ini melibatkan banyak dokumen (lihat A 59 k 16(1)(c) KKM 2012); dan (d) kes ini penting kepada plaintif-plaintif (lihat A 59 k 16(1)(e) KKM 2012) (lihat perenggan 52–53).]

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)

Era Kemuncak Jaya (M) Sdn Bhd v Tenaga Switchgear Sdn Bhd [2021] MLJU 1855; [2022] 1 MLRH 208, HC (refd)

Genneva Malaysia Sdn Bhd v Tio Jit Hong & Ors [2020] 6 MLJ 703, CA (refd)

HT Maltec Consultants v Malaysian Resources Corporation Bhd [2015] 5 AMR 607, HC (refd)

Jambatan Merah Sdn Bhd v Public Bank Berhad [2015] MLJU 1208; [2016] 1 CLJ 811, HC (refd)

Lim Kar Bee v Abdul Latif bin Ismail [1978] 1 MLJ 109, FC (refd)

Pickfords Limited v Celestica Limited [2003] EWCA Civ 1741, CA (refd)

Sykt Faiza Sdn Bhd & Anor v Faiz Rice Sdn Bhd & Anor and another suit [2019] 7 MLJ 175, HC (refd)

Tan Kang Hai v Slimming Sanctuary Sdn Bhd [2016] MLJU 973; [2016] 5 MLRH 651, HC (refd)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Usima Sdn Bhd v Lee Hor Fong (trading under the name and style of Pembinaan

LH Fong) [2017] 5 MLJ 273, FC (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Civil Law Act 1956 s 11
Contracts Act 1950 ss 2(a), (b), 7(a), (b), 74, 74(1)
Evidence Act 1950 ss 8(2), 115
Registration of Businesses Act 1956
Rules of Court 2012 O 34 r 2(2)(e)(i), O 34 r 2(2)(j), 2(2)(k), O 42 r 12, O 59 rr 2(2), 3(2), 8(b), 16(1)(c), (1)(e), (1)(f), (2), (3), 19(1), 19(2)

Long Chay Jo (with Tang Choon Hao, Thomas Lee Ming Zhang, Lydia Chong Nien Chee and Callie Koay Kai Lih) (Munhoe) for the plaintiff.
Muhammad Azwar bin Abdul Manab (with Muhammad Azrul Haziq bin Khairullah and Nor Aziah bt Harun) (Azwar & Partners) for the defendant.

Wong Kian Kheong J:

A. INTRODUCTION

[1] This case demonstrates the efficacy of post-trial case management ('post-trial CM') by which learned counsel of all parties agree to:

(1) post-trial agreed facts ('post-trial AF'); and

(2) post-trial agreed issues ('post-trial AI') so as to:

(a) save time, effort and costs of all parties; and

(b) assist the court in making a post-trial decision ('post-trial decision').

B. BACKGROUND

[2] Mr Ng Hee Sin ('SP3') and Mr Ng Hee Chye ('Hee Chye') are brothers who are the common directors and shareholders of the first plaintiff company ('first plaintiff') and second plaintiff company ('second plaintiff'). In this judgment, the first plaintiff and second plaintiff shall be referred collectively as the 'plaintiffs'.

[3] The defendant ('defendant') is the sole proprietor of 'Triple A Aura Resources' ('TAAR'). As explained in *HT Maltec Consultants v Malaysian Resources Corporation Bhd* [2015] 5 AMR 607, at [17], the Registration of Businesses Act 1956 ('the RBA') does not confer legal personality on any business which is registered under RBA as a sole proprietorship or partnership. Accordingly:

(1) the defendant is personally responsible in law for TAAR's admissions, acts, omission, documents and debts; and

(2) the defendant cannot hide behind the business registration of TAAR pursuant to RBA.

[4] The defendant approached SP3 and Hee Chye to assist the defendant to secure the following two projects ('two projects') from Majlis Bandaraya Shah Alam ('MBSA'):

(1) to design, build, install and complete a bridge to Pulau Undan in Tasik Barat, Taman Tasik Shah Alam ('first project'); and

(2) to design, build, install and complete a 'Landscape Musical Fountain' at Tanjung area and part of Tasik Barat, Taman Tasik Shah Alam ('second project').

[5] For the two projects:

(1) on 11 July 2019:

(a) MBSA held a pre-tender visit of the site of the two projects ('site') for potential bidders who wished to tender for the two projects ('pre-tender site visit'); and

(b) together with the defendant, SP3 and Hee Chye participated in the pre-tender site visit

— please refer to para 1 post-trial AF;

(2) the second plaintiff engaged a company in the People's Republic of China, 'Guangzhou Migo Import and Export Company' (GMIE), to procure materials for the two projects ('procurement (two projects)'). Consequently, GMIE issued a price quotation dated 10 August 2019 for the procurement (two projects) ('GMIE's price quotation (10 August 2019)');

(3) the plaintiffs issued four price quotations to TAAR, all dated 14 August 2019 ('plaintiffs' four price quotations (14 August 2019)') — para 2 post-trial AF;

(4) the plaintiffs prepared for TAAR conceptual drawing, proposed design elements, animation, samples, work plan, schedule and idea for TAAR ('plaintiffs' pre-tender works') — para 3 post-trial AF; and

(5) bills of quantities ('BQs') for the two projects had been prepared by the plaintiffs for TAAR — para 4 post-trial AF.

[6] By way of two letters, both dated 29 October 2019, MBSA had awarded the two projects to TAAR ('two main contracts (MBSA/TAAR)') as follows:

(1) the first main contract (MBSA/TAAR) concerned the first project ('first main contract (MBSA/TAAR)'). The value of the first main contract (MBSA/TAAR) was RM2,496,547; and

(2) the second project was provided in the second main contract (MBSA/TAAR) ('second main contract (MBSA/TAAR)'). The second main contract (MBSA/TAAR) was worth RM1,968,146

— para 6 post-trial AF.

[7] TAAR issued:

(1) one letter of award ('LA') dated 5 November 2019 to the first plaintiff regarding the first project ('LA (first plaintiff, 5 November 2019)'); and

(2) one LA dated 5 November 2019 to the second plaintiff in respect of the second project ('LA (second plaintiff, 5 November 2019)')

— para 7 post-trial AF. This judgment shall refer to the LA (first plaintiff, 5 November 2019) and LA (second plaintiff, 5 November 2019) collectively as the 'two LAs (5 November 2019)'.

[8] As there were errors in the two LAs (5 November 2019), on 7 November 2019 TAAR issued the following four LAs ('four LAs (7 November 2019)'):

(1) two LAs to the first plaintiff concerning the two projects ('two LAs (first plaintiff, 7 November 2019)'); and

(2) two LAs to the second plaintiff regarding the two projects ('two LAs (second plaintiff, 7 November 2019)'),

— paras 8 to 10 PTAF.

[9] TAAR issued four purchase orders ('four POs') as follows:

(1) two POs were issued to the first plaintiff with regard to the two projects; and

(2) two POs were issued to the second plaintiff in respect of the two projects

— para 11 post-trial AF.

[10] After the issuance of four POs:

(1) the plaintiffs commenced various works for the two projects ('plaintiffs' works');

(2) the first plaintiff had lent a total sum of RM25,000 to the defendant for the latter's use for the two projects ('first plaintiff's loan');

(3) the second plaintiff appointed GMIE to perform works for the two projects. GMIE had issued to the second plaintiff two invoices dated 19 December 2019 and 15 April 2021 ('GMIE's two invoices'); and

(4) the plaintiffs attended meetings with MBSA together with the defendant on 11 November 2019, 18 November 2019, 19 November 2019, 19 December 2019 and 6 January 2020 ('five meetings (MBSA/plaintiffs/defendant)') — paras 13 and 15 post-trial AF.

[11] On 6 January 2020:

(1) at a meeting held with MBSA, the defendant informed the plaintiffs that he would be terminating the appointment of the plaintiffs under the four LAs (7 November 2019) — para 15 post-trial AF; and

(2) TAAF sent the following four letters to the plaintiffs, all dated 5 January 2020 ('defendant's four termination letters'):

(a) two letters which terminated the appointment of the first plaintiff with regard to the two projects ('defendant's two termination letters (first plaintiff)'); and

(b) two letters which terminated the appointment of the second plaintiff in respect of the two projects ('defendant's two termination letters (second plaintiff)'),

— which terminated the appointment of the plaintiffs under the four LAs (7 November 2019): para 16 post-trial AF.

[12] The following five invoices had been issued by the plaintiffs to TAAF ('plaintiffs' five invoices'):

(1) the first plaintiff had issued four invoices to TAAF totaling RM890,621.87 ('first plaintiff's four invoices') as follows:

(a) two invoices dated 17 January 2020 (which amounted to RM63,263.40 ''(first plaintiff's two invoices (17 January 2020)'); and

(b) two invoices dated 21 January 2020.

(2) one invoice dated 8 January 2020 for a sum of RM111,000 had been issued by the second plaintiff to TAAF,

— paras 20 and 21 post-trial AF.

[13] The first plaintiff's then solicitors, Messrs 'Stephen & Co', issued a letter dated 13 January 2020 to TAAR ('first plaintiff's demand (13 January 2020)') which demanded, among others, that the defendant's two termination letters (first plaintiff) be retracted within 24 hours from the date of the first plaintiff's demand (13 January 2020) — para 18 post-trial AF.

[14] TAAR denied the contents of the first plaintiff's demand (13 January 2020) by way of a letter dated 17 February 2020 ('TAAR's letter (17 February 2020)') — para 22 post-trial AF. TAAR's Letter (17 February 2020) stated as follows, among others:

(1) the contract between TAAR and the first plaintiff was based on the first main contract/TAAR — para 2;

(2) all the terms in the LA (first plaintiff, 5 November 2019) and two LAs (first plaintiff, 7 November 2019) 'remain applicable and supplement one another' — para 3; and

(3) TAAR maintained its position as stated in the defendant's two termination letters (first plaintiff) and would 'vigorously defend any action' brought by the first plaintiff — para 11.

[15] The defendant met with SP3 on 21 February 2020, 23 February 2020 and 28 February 2020 and informed SP3 that the defendant intended to withdraw the defendant's termination ('(four LAs) ('three meetings (defendant/SP3))') — para 23 post-trial AF.

[16] As part payment for the first plaintiff's four invoices, the defendant issued a cheque dated 2 April 2020 to the first plaintiff for a sum of RM66,000 ('defendant's cheque (2 April 2020)') — para 24 post-trial AF. The defendant's cheque (2 April 2020) was however dishonoured.

[17] The plaintiffs instructed their present solicitors to issue the following demands to the defendant:

(1) demand dated 20 April 2020 which alleged that, among others, the defendant's two termination letters (first plaintiff) was wrongful ('first plaintiff's demand (20 April 2020)') — para 25 post-trial AF; and

(2) demand dated 20 April 2020 which alleged that, among others, the defendant's two termination letters (second plaintiff) was wrongful ('second plaintiff's demand (20 April 2020)') — para 26 post-trial AF.

There was no response by the defendant to the first plaintiff's demand (20 April 2020) and second plaintiff's demand (20 April 2020) (referred collectively in this judgment as the 'plaintiffs two demands (20 April 2020)').

[18] In view of the defendant's four termination letters:

(1) the plaintiffs kept the final drawings for the two projects from the defendant ('plaintiffs' final drawings (two projects)'); and

(2) the plaintiffs' final drawings (two projects) were tendered at the trial of

this suit ('trial') by SP3 as exhs P1 and P2.
— para 29 post-trial AF.

[19] The defendant admitted that he owed first plaintiff a total sum of RM63,263.40 as stated in the first plaintiff's two invoices (17 January 2020) — para 30 post-trial AF.

C. TRIAL

C(1). Case for the plaintiffs

[20] The plaintiffs had claimed from the defendant for, among others, the following monetary remedies ('plaintiffs' claim'):

(1) the return of the first plaintiff's loan (RM25,000) by the defendant;

(2) the value of the plaintiffs' works as follows:

(a) a sum of RM890,621.87 shall be paid by the defendant to the first plaintiff for the works performed by the first plaintiff for the defendant ('first plaintiffs' works') pursuant to the two LAs (first plaintiff, 7 November 2019); and

(b) the defendant shall be liable for a sum of RM111,000 to the second plaintiff for the works completed by the second plaintiff for the defendant ('second plaintiffs' works') pursuant to the two LAs (second plaintiff, 7 November 2019).

(3) the defendant shall pay for the loss of profit suffered by the plaintiffs as a result of the unlawful defendant's four termination letters ('loss of profit (plaintiffs)').

[21] The following three witnesses testified for the plaintiffs:

(1) Puan Khairunnisa bt Mohd Zaini ('SP1'), MBSA's landscape architect;

(2) Sr Lim Kok Sang ('SP2'), a consultant quantity surveyor (QS); and

(3) SP3.

[22] SP1 gave the following evidence, among others:

(1) SP1 was responsible for landscape development in Shah Alam and was involved in the two projects;

(2) the plaintiffs were the defendant's consultants and suppliers who were present at:

(a) the pre-tender site visit; and

(b) meetings with MBSA regarding the two projects ('MBSA meetings'). SP1 had met SP3 and Hee Chye at three or four MBSA meetings; and

(3) for the purpose of the two projects, MBSA had created a 'WhatsApp Chat Group' which included the defendant, SP3 and Hee Chye ('MBSA'S WhatsApp Chat Group'). SP1 confirmed the contents of all the messages exchanged in MBSA'S WhatsApp Chat Group ('MBSA'S WhatsApp Chat Group Messages').

[23] According to SP3, among others:

(1) as the defendant had no expertise, experience and resources to bid for and complete the two projects, the defendant represented to SP3 and Hee Chye that if the defendant secured the two projects from MBSA, the defendant would appoint the plaintiff as subcontractors for the two projects ('defendant's representation');

(2) based on the defendant's representation:

(a) the plaintiffs attended the pre-tender site visit;

(b) the plaintiffs' pre-tender works were done;

(c) the second plaintiff obtained GMIE's price quotation; and

(d) the plaintiffs' four price quotations and BQ's were prepared for the defendant.

(3) after the issuance of the four LAs (7 November 2019):

(a) TAAR issued four POs to the plaintiffs;

(b) the first plaintiff's loan was made to the defendant;

(c) the second plaintiff had appointed GMIE to perform works for the second project and GMIE's two invoices had been issued to the second plaintiff;

(d) the plaintiffs' works were done. The plaintiffs have relied on two 'progress reports' which contain details and photographs of the plaintiffs' works ('two progress reports'); and

(e) the plaintiffs attended five meetings (MBSA/plaintiffs/defendant).

(4) the defendant's termination (four LAs) were wrongfully made;

(5) the defendant did not pay for the five invoices (plaintiffs);

(6) the defendant's cheque (2 April 2020) was not honoured;

(7) the defendant did not deny the plaintiff's two demands (20 April 2020); and

(8) as a result of the unlawful defendant's termination (four LAs), the plaintiffs suffered loss of profit (plaintiffs). For this claim, SP3 relied on SP2's expert opinion as contained in SP2's report dated 5 August 2021 ('SP2's expert opinion').

At the trial, SP3 had adduced the following documentary evidence, among others:

(i) WhatsApp messages between SP3 and the defendant from 12 July 2019 to 25 October 2019 ('WhatsApp messages (SP3/defendant)');

(ii) MBSA'S WhatsApp Chat Group Messages; and

(iii) the plaintiffs' final drawings (two projects).

[24] SP2 testified as follows, among others:

(1) SP2 is a QS who is registered with, among others, the following professional bodies:

(a) Board of Quantity Surveyors Malaysia;

(b) Fellow of Royal Institution of Surveyors Malaysia; and

(c) Fellow of Royal Institution of Chartered Surveyors United Kingdom.

(2) SP2 has more than 20 years of work experience with regard to building and civil engineering works in Malaysia, Ireland and the United Arab Emirates;

(3) with regard to the loss of profit (plaintiffs), SP2's expert opinion is as follows:

(a) the first plaintiff suffered loss of profit which amounted to RM1,067,028.51 ('loss of profit (first plaintiff)'). The loss of profit (first plaintiff) consisted of the following sums:

(i) the first plaintiff suffered loss of profit in a sum of RM625,597.85 for the first project; and

(ii) with regard to the second project, the first plaintiff suffered loss of profit of RM441,430.66; and

(b) a sum of RM103,460.84 constituted loss of profit which had been suffered by the second plaintiff ('loss of profit (second plaintiff)'). The loss of profit (second plaintiff) was computed as follows:

(i) the second plaintiff suffered loss of profit in an amount of RM40,560.84 for the first project; and

(ii) loss of profit of RM62,900 was suffered by the plaintiff regarding the second project.

C(2). The defendant's case

[25] The defendant resisted the plaintiffs' claim by way of the following testimony, among others:

(1) the defendant claimed to have been involved in, among others, renovation of private homes and work regarding electrical wiring, roofs and land clearing;

(2) the defendant's representation was denied. In fact, the defendant alleged that SP3 voluntarily assisted the defendant to bid for the two projects;

(3) the plaintiffs did not accept the two LAs (5 November 2019) and four LAs (7 November 2019). Nor were there execution of formal agreements between the plaintiffs and defendant for the two projects;

(4) the plaintiffs did not comply with the conditions stipulated in the two LAs (5 November 2019);

(5) the defendant's four termination letters were valid;

(6) the defendant disputed:

(a) the value of the plaintiffs' works; and

(b) loss of profit (plaintiffs).

(7) after the defendant's four termination letters, the defendant completed the two projects with the consultancy services of a 'water features specialist' named AS Engineering Sdn Bhd.

D. POST-TRIAL AF AND POST-TRIAL AI

[26] After the conclusion of every trial, I conduct post-trial CM as follows:

(1) parties are given a specific time period (generally not more than two weeks) by the court to prepare notes of evidence ('NOE'). The court must ensure that there is no delay in the preparation of NOE because any delay in the preparation of NOE can only delay the filing of parties' written submission ('WS') and this in turn will cause a delay in the delivery of the post-trial decision;

(2) during the preparation of NOE, learned counsel are directed by court to draft post-trial AF and post-trial AI. Parties have already adduced all evidence to support their case at the trial ('evidence'). Consequently, there is nothing to prevent learned counsel from drafting post-trial AF and post-trial AI based on the evidence;

(3) a party (X) may decide:

(a) not to draft post-trial AF and/or post-trial AI; or

(b) not to agree to post-trial AF and/or post-trial AI.

X's conduct in respect of post-trial AF and/or post-trial AI ('X's conduct (trial)') may be considered by the court under O 59 r 8(b) of the Rules of Court 2012 ('the RC') when the court determines the amount of costs to be awarded after the delivery of post-trial decision ('costs (quantum)'). I reproduce below O 59 r 8(b) RC:

> O 59 r 8 Special matters to be taken into account in exercising discretion
>
> *The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account —*
>
> ...
>
> (b) *the conduct of all the parties, including conduct* before and *during the proceedings* ... (Emphasis added.)

By reason of O 59 r 8(b) of the RC:

(i) if X agrees to post-trial AF and post-trial AI, X's Conduct constitutes a reason in favour of X when court determines costs (quantum); or

(ii) if X does not draft and/or agree to post-trial AF and post-trial AI, the court may consider X's Conduct against X when costs (quantum) is determined by court.

(4) after parties have submitted a draft post-trial AF and post-trial AI to court:

(a) the court cannot compel parties to amend, withdraw and/or add to the contents of post-trial AF. This is understandable because parties can only agree to post-trial AF on their own volition; and

(b) the court should consider the draft post-trial AI with learned counsel in the post-trial CM ('court's discussion (draft post-trial AI)'). In the court's discussion (draft post-trial AI):

(i) the court should assist learned counsel by clarifying and/or 'refining' question(s) of law and/or fact to be presented to court in the post-trial AI (which will be subsequently decided by the court);

(ii) if the court is of the view that there is/are relevant question(s) of fact and/or law which has/have not been presented in the draft post-trial AI ('additional question(s)'), in the interest of justice, the court should include the additional question(s) in the post-trial AI. By the court's inclusion of additional question(s) in the post-trial AI, learned counsel can address the additional question(s) in the WS and parties would then have been accorded their right of hearing in respect of the additional question(s); and

(iii) if a party insists on a particular issue(s) to be included in the post-trial AI and this/these issue(s) is/are objected to by the adverse party ('non-agreed issue(s)'), the court should nevertheless allow the non-agreed issue(s) to be included in the post-trial AI. This is because firstly, in the interest of justice, learned counsel should be given the latitude to pose to the court any issue(s), including non-agreed issue(s), as learned counsel thinks fit. Secondly, it is pre-mature during the court's discussion (draft post-trial AI) to decide on the relevancy of any question, including non-agreed issue(s). In other words, during the court's discussion (draft post-trial AI), it is not prudent for the court to reject non-agreed issue(s) in the post-trial AI. Thirdly, it is better for the court to err on the side of caution and include the non-agreed issue(s) in the post-trial AI. Lastly, as explained in sub-para 28(3) below, the court is not bound in any manner by post-trial AI, including non-agreed issue(s). There is therefore no risk of injustice if the non-agreed issue(s) is/are included in the post-trial AI.

It is to be emphasised that the court's discussion (draft post-trial AI) should not be unduly delayed and should be completed before the preparation of NOE. If there is inordinate delay in the court's discussion (draft post-trial AI), this will consequently delay the filing of WS and delivery of post-trial decision; and

(5) after parties have agreed to post-trial AF and post-trial AI:

(a) the court may give directions for parties to file and serve WS; and

(b) the court may fix a date for the delivery of post-trial decision.

[27] There are many reasons for the court to direct parties to draft post-trial AF and post-trial AI. Firstly, as explained in the above sub-paras 1(a) and (b), post-trial AF and post-trial AI assist parties and court by ensuring an expeditious and economical disposal of the case. Secondly, without post-trial AF and post-trial AI, valuable time, effort and costs of parties may be wasted when learned counsel include the following matters in their WS:

(1) in WS, parties may dispute fact(s) which has/have already been proved at the trial (which can form the subject matter of post-trial AF); and/or

(2) submission may be made in the WS on issue(s) of fact and/or law which is/are not relevant to the case ('irrelevant issue(s)').

In view of the above reasons for post-trial AF and post-trial AI, WS should only be prepared by learned counsel after post-trial AI have been agreed by parties.

[28] If post-trial AF and/or post-trial AI have been agreed by parties:

(1) the post-trial AF and post-trial AI should supersede the pre-trial agreed facts ('pre-trial AF') and pre-trial agreed issues ('pre-trial AI') which have been previously agreed by parties before the commencement of trial pursuant to O 34 r 2(2)(j) and (k) of the RC respectively.

Generally:

(a) post-trial AF should be longer than pre-trial AF because there may be more agreed facts between the parties which emerge from the evidence; and

(b) post-trial AI should not be as lengthy as pre-trial AI because many questions in pre-trial AI may not be relevant after the trial in question.

(2) parties are barred by post-trial AF from denying the truth of the contents of post-trial AF. I can foresee the possibility of a party (Y) who applies to court to amend or withdraw a certain 'agreed fact' in post-trial AF ('Y's application') on the ground that the 'agreed fact' has been disputed by Y at the trial in question. In such an instance, the court can simply decide Y's application based solely on the evidence; and

(3) ideally, by way of the court's discussion (post-trial AI) (please refer to the above sub-para 26(4)(b)), all relevant issues of fact and law to be determined by court in the case, should be stated in the post-trial AI. Having said that, notwithstanding the court's discussion (post-trial AI), the court is not bound in any manner by post-trial AI. Firstly, the court may decide that a particular issue stated in the post-trial AI may not be relevant or may not have arisen in the case.

Secondly, if there is/are relevant question(s) of fact and/or law which has/have not been presented to court in post-trial AI and/or WS, in accordance with the second rule of natural justice, the court should pose such question(s) to all learned counsel before making the post-trial decision — please refer to *Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973; [2016] 5 MLRH 651, at [11](2). In this manner, learned counsel can assist court by making the necessary submission to court in the WS on such question(s) and fulfil their duties to court and their clients.

E. ISSUES

[29] The following questions arise in this case:

(1) was the first plaintiff's loan made to the defendant?

(2) can the defendant rely on the two LAs (5 November 2019) to resist the plaintiff's claim?

(3) did the four LAs (7 November 2019) constitute contracts between the defendant and plaintiffs? This depends on whether the plaintiffs had accepted the four LAs (7 November 2019) by their conduct within the meaning of s 2(b) read with s 7(a) and (b) of the Contracts Act 1950 ('the CA'); and

(4) if the four LAs (7 November 2019) constituted contracts between the defendant and plaintiffs:

(a) whether the defendant's four termination letters were lawful; and

(b) if the defendant's four termination letters were unlawful and had breached the four LAs (7 November 2019), can the plaintiffs claim from the defendant pursuant to s 74(1) of the CA:

(i) value of works done by the plaintiffs under the four LAs (7 November 2019); and

(ii) loss of profit (plaintiffs)?

F. FINDINGS OF FACT

F(1). Credibility of witnesses

[30] Firstly, I accept SP1's evidence because SP1 is an independent witness without any interest in the outcome of this suit.

[31] I find as a fact that SP3 is a credible witness due to the following evidence and reasons:

(1) SP3's testimony is supported by the following documents:

(a) WhatsApp messages (SP3/defendant). Firstly, WhatsApp messages constitute contemporaneous documentary evidence to which the court may attach weight — please refer to *Sykt Faiza Sdn Bhd & Anor v Faiz Rice Sdn Bhd & Anor and another suit* [2019] 7 MLJ 175, at [23](1) and [23](2). Secondly, during cross-examination, the defendant had admitted that the WhatsApp messages (SP3/defendant) had indeed been made;

(b) MBSA'S WhatsApp Chat Group Messages;

(c) GMIE's price quotation (10 August 2019);

(d) plaintiffs' four price quotations (14 August 2019);

(e) plaintiffs' pre-tender works;

(f) BQs;

(g) four LAs (7 November 2019) issued by the defendant;

(h) the defendant's four POs;

(i) GMIE's two invoices;

(j) plaintiffs' five invoices;

(k) defendant's cheque (2 April 2020);

(l) plaintiffs' final drawings (two projects);

(m) the audio recording of the three meetings (defendant-SP3) ('audio recording (three meetings)'); and

(n) transcripts of the audio recording (three meetings) ('transcript (three meetings)').

It is trite law that when there is a conflict between oral and documentary evidence, especially contemporaneous documents, the court should accept the contents of documents in preference to self-serving testimony — please see the judgment of Chang Min Tat FJ the Federal Court case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, at 234; and

(2) the conduct of a party is relevant under s 8(2) of the Evidence Act 1950 ('the EA'). Section 8(2) provides as follows:

> *The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto*, and the conduct of any person an offence against whom is the subject of any proceeding, *is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto*. (Emphasis added.)

The following conduct of SP3 supports his veracity:

(a) pre-tender site visit;

(b) the first plaintiff's loan was given to the defendant;

(c) five meetings (MBSA/plaintiffs/defendant); and

(d) three meetings (defendant/SP3).

[32] This court makes a factual finding that the defendant is not a reliable witness. This finding of fact is premised on the following evidence and reasons:

(1) the documents stated in the above sub-paras 27(1)(a) to (n), in particular:

(a) WhatsApp messages (SP3/defendant);

(b) four LAs (7 November 2019) issued by the defendant;

(c) the defendant's four POs;

(d) defendant's cheque (2 April 2020) which was subsequently dishonoured by the defendant himself;

(e) audio recording (three meetings); and

(f) Transcript (three meetings)

— undermine, if not destroy, the defendant's credibility;

(2) the defendant gave sworn evidence that the defendant's representation was not made. However, as explained in para 33 below, such a testimony by the defendant cannot be accepted by the court;

(3) during cross-examination by the plaintiffs' learned counsel, Mr Long Chay Jo, the defendant admitted the following matters:

(a) the plaintiffs had assisted the defendant in, among others, the preparation of the pre-tender works ('defendant's first admission'). The defendant's first admission was stated in the WhatsApp messages (SP3/defendant);

(b) the defendant did not request in the WhatsApp messages (SP3/defendant) for:

(i) the plaintiffs to accept in writing the four LAs (7 November 2019) issued by the defendant; and

(ii) the plaintiffs to prepare two formal agreements to be executed by the defendant and plaintiffs regarding the two projects; and

(c) at the three meetings (defendant-SP3), the defendant requested for the plaintiffs to continue with the two projects ('defendant's second admission'). The defendant's second admission is proven by the audio recording (three meetings) and transcript (three meetings).

(3) Before the commencement of trial, during pre-trial case management, the plaintiffs' solicitors had handed to the defendant's solicitors, among others, the audio recording (three meetings) and transcript (three meetings). The defendant's solicitors had marked the audio recording (three meetings) and transcript (three meetings) as 'Part B' documents pursuant to O 34 r 2(2)(e)(i) of the RC. Consequently:

(i) the authenticity of the audio recording (three meetings) and transcript (three meetings) is not disputed by the defendant;

(ii) the audio recording (three meetings) and transcript (three meetings) are admissible as evidence in this case; and

(iii) the court may attach weight to the audio recording (three meetings) and transcript (three meetings) in the interest of justice.

(4) the following conduct by the defendant shows that his testimony cannot be believed:

(a) the defendant allowed the plaintiffs to attend:

(i) pre-tender site visit; and

(ii) five meetings (MBSA/plaintiffs/defendant).

(b) the defendant did not inform SP1 and/or MBSA that there was no relationship between the defendant and plaintiffs. Nor did the defendant disabuse SP1 of her impression that the plaintiffs were the defendant's consultants and suppliers;

(c) notwithstanding the issuance of the defendant's termination (four LAs), the defendant did not request SP1 to remove SP3 and Hee Chye from MBSA'S WhatsApp Chat Group; and

(d) the defendant did not deny or object to the following documents which were against him:

(i) plaintiffs' five invoices; and

(ii) plaintiff's two demands (20 April 2020).

F(2). Whether defendant's representation had been made

[33] I have no hesitation to make a finding of fact that on a balance of probabilities, the defendant's representation had indeed been made to the plaintiffs. The following evidence and reasons support this factual finding:

(1) during cross-examination, the defendant admitted that before he started business with TAAR on 31 January 2017 (when TAAR was registered as a sole proprietorship under RBA), he was an officer with the Malaysian Anti-Corruption Commission ('MACC'). The defendant further admitted under cross-examination that prior to the two main contracts (MBSA/TAAR), the defendant had not been awarded any construction contract which was similar in nature and value as the two projects. It is therefore clear that the defendant did not have the necessary expertise, experience, track record and financial resources to bid for, let alone complete, the two projects; and

(2) the plaintiffs are not charitable institutions. If the defendant's representation had not been made, the plaintiffs would not have expended much time, effort and money to do the following matters:

(a) the pre-tender site visit would not have been made;

(b) GMIE's price quotation (10 August 2019) would not have been obtained;

(c) plaintiffs' four price quotations (14 August 2019) would not have been issued to the defendant;

(d) plaintiffs' pre-tender works would not have been performed for the defendant;

(e) the plaintiffs would not have prepared BQs for the defendant;

(f) the first plaintiff's loan would not have been advanced to the defendant;

(g) the plaintiffs would not have attended five meetings (MBSA/plaintiffs/defendant);

(h) GMIE would not have been appointed and GMIE's two invoices would not have been issued;

(i) the plaintiffs' five invoices would not have been sent to the defendant;

(j) the plaintiffs' final drawings (two projects) would not have been prepared; and

(k) SP3 would not have met the defendant in the three meetings (defendant-SP3).

G. WAS FIRST PLAINTIFF'S LOAN GIVEN TO DEFENDANT?

[34] This court finds as a fact that on a balance of probabilities the first plaintiff's loan had been made to the defendant because of the following evidence and reasons:

(1) the first plaintiff's loan was advanced to the defendant by way of the following three tranches:

(a) a sum of RM10,000 was advanced in cash by the first plaintiff to the defendant on 11 November 2019;

(b) the first plaintiff lent RM5,000 to the defendant by way of a bank transfer on 18 November 2019. This tranche is proven when the first plaintiff adduced a bank transfer confirmation which showed a bank transfer of RM5,000 to the defendant on 18 November 2019; and

(c) on 23 December 2019, the first plaintiff gave a cash advance of RM10,000 to the defendant.

The first plaintiff's loan was evidenced by three WhatsApp messages (SP3/defendant); and

(2) SP3's oral evidence regarding the first plaintiff's loan was not challenged during SP3's cross-examination by the defendant's learned counsel,

Encik Muhammad Azwar bin Abdul Manab. As such, SP3's testimony in respect of the first plaintiff's loan, is deemed to be accepted by the defendant — please refer to the judgment of the Federal Court delivered by Raja Azlan Shah CJ (Malaya) (as His Majesty then was) in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 at p 213.

H. CAN DEFENDANT RELY ON TWO LAS (5 NOVEMBER 2019)?

[35] I reproduce below ss 2(a), (b) and 7 of the CA:

> s 2 *Interpretation*
>
> *In [CA] the following words and expressions are used in the following senses, unless a contrary intention appears from the context*:
>
> (a) *when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal*;
>
> (b) *when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise*;
>
> ...
>
> s 7 *Acceptance must be absolute*
>
> *In order to convert a proposal into a promise the acceptance must —*
>
> (a) *be absolute and unqualified*;
>
> (b) *be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted*. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in that manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance. (Emphasis added.)

[36] Encik Muhammad Azwar has relied on the two LAs (5 November 2019) to resist the plaintiff's claim. I am of the view that the defendant cannot rely on the two LAs (5 November 2019). My reasons are as follows:

(1) the two LAs (5 November 2019) constituted 'proposals' (popularly known as 'offers') within the meaning of s 2(a) of the CA. The defendant's proposals in the two LAs (5 November 2019) were superseded by his new proposals in the four LAs (7 November 2019). In this regard, I rely on the following judgment of Dyson LJ (as he then was) in United Kingdom's Court of Appeal in *Pickfords Limited v Celestica Limited* [2003] EWCA Civ 1741 at [17] to [19]:

> [17] *What is the position where A makes an offer to B and then makes a later offer to B? By making the later offer, does A withdraw the earlier one? That is the first*

question that arises in this case. No authority has been cited to us in which this question has been considered. In my judgment it must depend on the nature of the two offers and the circumstances in which they are made. Take a simple case where A asks B, a decorator, to quote for the painting of his house. Suppose, further, that B quotes A a figure of £200 per day, plus materials. Before deciding whether to instruct B to proceed, A decides to ask B to provide a fixed price quotation. B provides a fixed price quotation of £1500. In those circumstances B's later quotation does not, without more, amount to a withdrawal of the first offer. It is produced at the request of A so that A can decide which of the two quotations to accept. That is the basis upon which the second quotation is sought and provided.

[18] *In such a case, in my judgment, something more than the mere submission of the second quotation is required to indicate that A has withdrawn the first offer. The two offers are inconsistent with each other only in the sense that they cannot both be accepted. But the question is not whether both offers can be accepted, but whether the making of the second offer clearly indicates an intention on the part of the offeror to withdraw the first offer.*

[19] *That simple case is, however, very different from what happened here. It is true that there are no findings of fact as to the circumstances which gave rise to the second offer. The substantial differences between the two offers in this case went far beyond a mere difference in price which could have been explained as consistent with two alternative offers both being on the table for the defendant to choose which to accept. In the absence of any findings of fact as to the circumstances which gave rise to the second offer, I would hold that the second offer did supersede and revoke the first offer*. (Emphasis added.)

(2) the plaintiffs did not 'accept' the defendant's proposals in the two LAs (5 November 2019) as understood in s 2(b) read with s 7(a) and (b) CA;

(3) the four POs (issued by the defendant) had referred to the four LAs (7 November 2019) and not to the two LAs (5 November 2019). It is thus clear that the defendant's reliance on the two LAs (5 November 2019) is a mere afterthought to defeat unlawfully the plaintiff's claim; and

(4) in paras 7 to 10 post-trial AF, the defendant has admitted that there were errors in the two LAs (5 November 2019) and upon the request of the plaintiffs, the defendant had issued the four LAs (7 November 2019).

I. WHETHER FOUR LAS (7 NOVEMBER 2019) CONSTITUTED CONTRACTS BETWEEN DEFENDANT AND PLAINTIFFS

[37] I accept Mr Long's submission that the four LAs (7 November 2019) constituted agreements between the defendant and plaintiffs with regard to the two projects. The following evidence and reasons underpin this decision:

(1) the four LAs (7 November 2019) fell within the definition of 'proposal' in s 2(a) of the CA

A (2) the four LAs (7 November 2019) did not prescribe the manner for the plaintiffs to accept the four LAs (7 November 2019). Accordingly, the plaintiffs were entitled under s 7(b) of the CA to accept the four LAs (7 November 2019) in 'some usual and reasonable manner'. One usual and reasonable manner for a person (Z) to accept a proposal is by way of
B Z's conduct — please refer to the judgment of Kamaludin Md. Said JCA in the Court of Appeal case of *Genneva Malaysia Sdn Bhd v Tio Jit Hong & Ors* [2020] 6 MLJ 703 at [50];

(3) in accordance with s 2(b) read with s 7(b) of the CA, the plaintiffs had
C accepted the four LAs (7 November 2019) by their conduct as follows:

(a) the plaintiffs' works were carried out

(b) GMIE had been appointed by the second plaintiff to perform works for the second project;

D

(c) the plaintiffs' attendance in five meetings (MBSA/plaintiffs/defendant);

(d) plaintiffs' five invoices had been issued to the defendant; and

E (e) plaintiffs' final drawings (two projects) had been prepared ('plaintiffs' acceptance (four LAs)'); and

(4) the plaintiffs' acceptance (four LAs) was 'absolute and unqualified' within the meaning of s 7(a) of the sCA.

F

[38] This court decides that the defendant is estopped from denying the fact that the four LAs (7 November 2019) constituted agreements between the defendant and plaintiffs in respect of the two projects. Firstly, in the Federal Court case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 333–334; [1995] 4 CLJ 283 at pp 294–295,
G Gopal Sri Ram JCA (as he then was) has decided that the doctrine of equitable estoppel has a wide application and may support a plaintiff's cause of action against a defendant. The estoppel doctrine is embodied in our s 115 of the EA which reads as follows:

H *When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.* (Emphasis added.)

I

In the Federal Court case of *Usima Sdn Bhd v Lee Hor Fong (trading under the name and style of Pembinaan LH Fong)* [2017] 5 MLJ 273 at [50], Balia Yusof FCJ has invoked the equitable doctrine of estoppel in a dispute regarding a construction contract.

The following conduct of the defendant, in my view, estops the defendant from disputing the fact that the four LAs (7 November 2019) constituted agreements between the defendant and plaintiffs regarding the two projects:

(1) the defendant had issued four POs to the plaintiffs. The four POs were not withdrawn by the defendant at any time. Nor did the defendant allege that the four POs had been erroneously issued by the defendant;

(2) the defendant did not deny the plaintiffs' five invoices;

(3) if there were no contracts between the plaintiffs and defendant, the defendant's cheque (2 April 2020) would not had been issued in the first place;

(4) the defendant communicated with SP3 regarding the two projects in WhatsApp messages (SP3/defendant);

(5) the defendant would not have attended the three meetings (defendant/SP3) and would not have made the defendant's second admission — please refer to the above sub-para 32(3)(c); and

(6) the defendant did not deny the plaintiffs' two demands (20 April 2020).

J. WERE DEFENDANT'S FOUR TERMINATION LETTERS LAWFUL?

[39] I have no hesitation to decide that the defendant's four termination letters were not valid because:

(1) the first and second paras in the defendant's four termination letters had wrongfully referred to the two LAs (5 November 2019). As explained in the above para 36, the two LAs (5 November 2019) did not constitute contracts between the defendant and plaintiffs with regard to the two projects. On the contrary, the four LAs (7 November 2019) formed the agreements between the defendant and plaintiffs in respect of the two projects — please refer to the above para 37. If the two LAs (5 November 2019) were indeed the two contracts between the defendant and plaintiffs regarding the two projects, the defendant would have issued two (not four) letters to terminate the two LAs (5 November 2019); and

(2) according to para 3 of the defendant's four termination letters, the plaintiffs had failed to prepare written agreements for the execution of all parties within the stipulated time period ('para 3'). The defendant's four termination letters did not however state what was the stipulated time period.

Paragraph 3 is unlawful for the following reasons:

(a) there is nothing in CA which requires an agreement to be in writing;

(b) the four LAs (7 November 2019) did not stipulate that the four LAs (7 November 2019) were subject to a condition precedent, namely, the parties must execute a written contract before the four LAs could be lawfully accepted by the plaintiffs;

(c) as explained in the above sub-paras 37(2) and (3), the plaintiffs had accepted the four LAs (7 November 2019) by their conduct; and

(d) the defendant is estopped from asserting that there should be written agreements between the defendant and plaintiffs in respect of the two projects — please refer to the above para 38.

[40] The unlawful defendant's four termination letters meant that the defendant had breached the four LAs (7 November 2019) ('defendant's four breaches (four LAs)').

K. CAN PLAINTIFF CLAIM DAMAGES FOR DEFENDANT'S FOUR BREACHES (FOUR LAS)?

[41] Section 74(1) of the CA states as follows:

> 74 *Compensation for loss or damage caused by breach of contract (1) CA*
>
> (1) *When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it*. (Emphasis added.)

[42] The scope of s 74(1) of the CA has been explained in *Jambatan Merah Sdn Bhd v Public Bank Berhad* [2015] MLJU 1208; [2016] 1 CLJ 811 at [46], as follows:

> [46] *Even if the plaintiff has suffered any loss or damage due to the defendant's Breach (Alleged Loss), the plaintiff must prove that the Alleged Loss is claimable and is not too remote under either one or both the limbs of s 74(1) CA (1950) as follows*:
>
> (a) *the Alleged Loss 'naturally arose in the usual course of things' from the defendant's Breach within the meaning of the first limb of s 74(1) CA (1950)*; and/or
>
> (b) *both the plaintiff and defendant 'knew, when they made the contract' that the Alleged Loss was 'likely to result from the breach' of the defendant's Breach as understood in the second limb of s 74(1) CA (1950)*. (Emphasis added.)

[43] To claim successfully for:

(1) the value of the plaintiffs' works ('value (plaintiffs' works)'); and

(2) loss of profit (plaintiffs) ('plaintiffs' two heads of claim').

The plaintiffs have the burden to prove the following two matters cumulatively:

(a) the plaintiffs' two heads of claim are not too remote to be recoverable in law under either one of the following two limbs of s 74(1) of the CA:

(i) the plaintiffs' two heads of claim 'naturally arose in the usual course of things' from the defendant's four breaches (four LAs) within the meaning of the first limb of s 74(1) of the CA ('first limb (s 74 of the CA)'); or

(ii) the plaintiffs and defendant knew when they entered into the four LAs (7 November 2019) that the plaintiffs' two heads of claim were 'likely to result' from the defendant's four breaches (four LAs) as understood in the second limb of s 74(1) of the CA ('second limb (s 74 of the CA)').

(b) the quantum of the plaintiffs' two heads of claim ('quantum (plaintiffs' claim)').

K(1). Whether plaintiffs' two heads of claim are too remote in law to be claimed under s 74(1) of the CA

[44] I am of the following view:

(1) the value (plaintiffs' works) fulfils the first limb (s 74 of the CA) because the value (plaintiffs' works) 'naturally arose in the usual course of things' from the defendant's four breaches (four LAs). If otherwise, despite the unlawful defendant's four termination letters, the defendant would be unjustly enriched by the value (plaintiffs' works); and

(2) the loss of profit (plaintiffs) falls under the second limb (s 74 of the CA), ie, the plaintiffs and defendant knew when they entered into the four LAs (7 November 2019) that the loss of profit (plaintiffs) was 'likely to result' from the defendant's four breaches (four LAs). This decision is premised on the following reasons:

(a) the four LAs (7 November 2019) were commercial contracts;

(b) the plaintiffs are not charitable institutions and did not accept the four LAs (7 November 2019) for any altruistic purpose;

(c) the defendant did not resign from MACC and register TAAR for any philanthropic reason; and

(d) the plaintiffs and defendant had knowingly entered into the four

LAs (7 November 2019) with a view to attain profit.

K(2). Can plaintiff recover quantum (plaintiffs' claim)?

[45] Firstly, this court decides that the plaintiffs have discharged the onus to prove the value (plaintiffs' works) based on the following evidence and reasons:

(1) the following documents evidence the value (plaintiffs' works):

(a) defendant's four POs;

(b) plaintiffs' five invoices; and

(c) two progress reports.

(2) the value (plaintiffs' works) had been stated in the plaintiffs' two demands (20 April 2020) and the defendant did not deny the value (plaintiffs' works) in the plaintiffs' two demands (20 April 2020). The following two appellate decisions have decided that in a commercial transaction, there is an implied admission that a party (T) owes a sum of money if T does not deny a letter requesting for T to repay that sum:

(a) Gopal Sri Ram JCA (as he then was) has delivered the following judgment of the Court of Appeal in *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 at pp 288–289; [1995] 4 CLJ 155 at p 159:

> *During argument, we registered our surprise at the learned judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.*
>
> *In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr J in Tan Cheng Hock v Chan Thean Soo* [1987] 2 MLJ 479, 487:
>
> > *In Wiedemann v Walpole* [1891] 2 QB 534, *537 an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise. Lord Esher M.R., in his judgment, remarked Here, we have only to see whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise.' (Emphasis added.) Earlier, in his judgment, he said, 'Now there are cases — business and mercantile cases in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.* (Emphasis added.)

(b) *Wong Hon Leong David* has been approved in the following judgment of

Azahar Mohamed FCJ (as he then was) in the Federal Court case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 at [62]:

> [62] ... *It is the ordinary nature of businessman to immediately refute any proposition injurious to him contained in letters and not to let it stands (see Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155). (Emphasis added.)

(3) the defendant did not adduce any evidence that the plaintiffs' works had not been performed in this case. Nor did the defendant tender any evidence to prove that the plaintiffs' works were defective. Consequently, the defendant could not dispute the value (plaintiffs' works).

[46] Premised on the evidence and reasons expressed in the above para 45, this court adjudges that the defendant shall pay the following judgment sums to the plaintiffs:

(1) a sum of RM890,621.87 shall be paid by the defendant to the first plaintiff for the first plaintiff's works ('value (first plaintiff's works)'); and

(2) the defendant shall pay to the second plaintiff an amount of RM111,000 for the second plaintiff's works ('value (second plaintiff's works)').

[47] Regarding loss of profit (plaintiffs):

(1) it is decided in *Era Kemuncak Jaya (M) Sdn Bhd v Tenaga Switchgear Sdn Bhd* [2021] MLJU 1855; [2022] 1 MLRH 208 at [37], as follows:

> [37] *Secondly, I am of the view that the court can decide the following three questions (three questions) in this case without the assistance of any expert testimony*:
>
> (a) the issue (breach of contract);
>
> (b) the issue (remoteness of damage) under s 74(1) (Contracts Act 1950); and
>
> (c) *the issue (quantum of damages)*.
>
> *I acknowledge that there may be exceptional cases when the three questions involve a highly technical matter which is beyond the competence of the court. In such exceptional matters, an expert's opinion may assist the court to decide the three questions. In this case, the three questions did not concern any highly technical matter which necessitated the defendant to adduce any expert view. Regrettably, SD5's Opinion on the three questions unnecessarily protracted the trial and escalated the costs incurred in this case*. (Emphasis added.)

Premised on *Era Kemuncak Jaya*, the court may decide on the

quantum of loss of profit (plaintiffs) ('quantum (plaintiffs' loss of profit)') without SP2's expert opinion;

(2) SP3 had given evidence regarding the quantum (plaintiffs' loss of profit) ('SP3's evidence (plaintiffs' loss of profit)'). As explained in the above para 31, SP3 is an honest witness. I therefore accept SP3's evidence (plaintiffs' loss of profit); and

(3) the defendant had testified that he had completed the two main contracts (MSBA/TAAR). Hence, the defendant was able to adduce evidence on how much profit or loss that he had derived or suffered from the completion of the two projects. However, the defendant did not tender any evidence to rebut SP3's evidence (plaintiffs' loss of profit). In any event, this court has made a finding of fact that the defendant is not a credible witness — please refer to the above para 32.

[48] Premised on SP3's evidence (plaintiffs' loss of profit), this court adjudges the following amounts of loss of profit (plaintiffs) to be paid by the defendant to the plaintiffs:

(1) the defendant shall pay to the first plaintiff a sum of RM1,067,028.51 as loss of profit (first plaintiff) ('sum (first plaintiff's loss of profit)'); and

(2) a sum of RM103,460.84 shall be paid by the defendant to the second plaintiff as loss of profit (second plaintiff) ('sum (second plaintiff's loss of profit)').

L. WHETHER PLAINTIFFS CAN CLAIM INTEREST ON SUMS ADJUDGED TO BE PAID BY DEFENDANT TO PLAINTIFFS

[49] I reproduce below s 11 of the Civil Law Act 1956 ('the CLA') and O 42 r 12 of the RC:

s 11 CLA *Power of Courts to award interest on debts and damages*

In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section:

(a) shall authorize the giving of interest upon interest;

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

O 42 r 12 RC *Interest on judgment debts*

Subject to rule 12A, except when it has been otherwise agreed between the parties, *every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied*. (Emphasis added.)

[50] The court has the following discretionary power to award interest on a judgment sum:

(1) by virtue of s 11 of the CLA, the court may award pre-judgment interest on any judgment sum 'at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period … between the date when the cause of action arose and the date of judgment' — please refer to the judgment of Raja Azlan Shah FJ (as His Majesty then was) in the Federal Court in *Lim Kar Bee v Abdul Latif bin Ismail* [1978] 1 MLJ 109, at 120; and

(2) according to O 42 r 12 of the RC, the court may order a judgment debtor to pay to the judgment creditor post-judgment interest at the rate of 5%pa on a judgment sum from the date of the oral decision of the case until full payment of the judgment sum.

[51] This court exercises its discretion to order the defendant to pay to the plaintiffs interest on the following judgment sums:

(1) the first plaintiff's demand (20 April 2020) gave the defendant 14 days from the date of the first plaintiff's demand (20 April 2020) to repay the first plaintiff's loan. As such, I exercise my discretion under s 11 of the CLA and O 42 r 12 of the RC to order the defendant to pay to the first plaintiff interest at the rate of 5%pa on an amount of RM25,000 from 5 May 2020 (after the lapse of 14 days as stated in the first plaintiff's demand (20 April 2020)) until the defendant's full payment of the said amount; and

(2) the defendant's four breaches (four LAs) occurred on 5 January 2020. As such, the plaintiffs' causes of action for the defendant's four breaches (four LAs) arose on 5 January 2020. Consequently, pursuant to s 11 of the CLA and O 42 r 12 of the RC this court awards interest at the rate of 5% pa on:

    (a) value (first plaintiff's works);

    (b) value (second plaintiff's works);

    (c) sum (first plaintiff's loss of profit); and

    (d) sum (second plaintiff's loss of profit),

('four judgment sums')

from 5 January 2020 until the defendant's full payment of the four judgmentsums.

M. COSTS

[52] By reason of O 59 rr 2(2), 3(2), 16(2), (3), 19(1) and (2) of the RC, I have ordered the defendant to pay costs to the plaintiffs on a standard basis.

[53] In the plaintiffs' bill of costs, the plaintiffs have claimed a sum of RM50,000 as 'getting up' (GU). I exercise my discretion to award an amount of RM40,000 as GU due to the following reasons:

(1) in this case, the defendant had agreed to post-trial AF and post-trial AI ('defendant's conduct (post-trial AF and post-trial AI)'). The defendant's conduct (post-trial AF and post-trial AI), according to O 59 r 8(b) of the RC (please refer to the above sub-para 26(3)(i)), reduces the amount of GU. This is because the defendant's conduct (post-trial AF and post-trial AI):

(a) had saved time, effort and costs of all learned counsel in this case; and

(b) has assisted me to decide this case.

(2) the high amount of the plaintiffs' claim is relevant according to O 59 r 16(1)(f) of the RC;

(3) this case involved many documents — please refer to O 59 r 16(1)(c) of the RC; and

(4) this case is important to the plaintiffs — please see to O 59 r 16(1)(e) of the RC.

N. CONCLUSION

[54] Premised on the above evidence and reasons, this court adjudges as follows:

(1) the defendant shall pay the following judgment sums to the plaintiffs:

(a) a sum of RM25,000 shall be paid to the first plaintiff (so as to repay the first plaintiff's loan); and

(b) four judgment sums — please refer to the above sub-paras 46(1), (2), 48(1) and (2).

(2) interest shall be paid to the plaintiffs by the defendant on the above judgment sums as explained in the above paras 51(1) and (2); and

(3) costs of this suit shall be paid by the defendant to the plaintiffs — please see the above para 53.

[55] In closing, it is hoped that post-trial CM should be utilised in all cases so as to expedite the delivery of post-trial decisions as well as to minimise time, effort and costs of parties.

Order accordingly.

Reported by Dzulqarnain Ab Fatar